IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 1955 OF 2005

WITH

WRIT PETITION NO. 1813 OF 2006

Pravin Vasant Malkar Age 31 years, Occ.: Service R/o : Tasgaon, Near Natyagriha, Taluka Tasgaon, District Sangli	]	Petitioner In both the Petitions
Vs.		
1) Mrs. Sheetal Vilas Khadake Age : 29 years, Occ.: Service R/o : 175 Shaniwar Peth, Karad, District Satara	]	Respondents in both the Petitions
2) State of Maharashtra	]	

Mr. U.P. Warunjikar for the Petitioner.
Mr. Dilip Bodke for Respondent No. 1.
Mr. Rajesh More, A.P.P. for the State.

CORAM : ABHAY S. OKA, J.

DATE : 1ST SEPTEMBER, 2006

JUDGMENT

1) Rule. The Advocates appearing for the respondents waive service. Considering the fact that the dispute relates to payment of maintenance to the first Respondent wife, Petitions are taken up for hearing forthwith.

2) The marriage between the Petitioner and the first Respondent was solemnised on 7th May 1999. According to the case of the Petitioner, the first Respondent published a Notice in local Newspaper

contending that there has been a customary divorce between the Petitioner and the first Respondent. On 4th July 2000, the first Respondent filed an application under Section 125 of The Code of Criminal Procedure, 1973 (hereinafter referred to as "said Code) in the Court of the Judicial Magistrate First Class at Karad for grant of monthly maintenance of Rs.1500/-. In the meanwhile, the first Respondent filed a Petition for divorce. The said petition was disposed of in terms of consent terms dated 26th September 2002 filed by the Petitioner and the first Respondent. The Consent Terms record that the parties have withdrawn applications made against each other. The consent terms also record that the first Respondent has received from the Petitioner maintenance amount upto 10th September 2002. It is mentioned that the first Respondent will not demand maintenance amount for the period upto 10th September 2002 in any proceeding including the pending application under Section 125 of the said Code.

3) The Petitioner initially filed a reply to the application under Section 125 of the said Code disputing liability to pay maintenance. Later on the Petitioner carried out amendment to the reply and relied upon the compromise in the petition filed by the first Respondent. The learned Magistrate by order dated 27th April 2004 allowed the application and granted maintenance of Rs.850/- per month to the first

Respondent from the date of the application. There were two revision applications filed in the Sessions Court against the said order. One application was filed by the Petitioner and second one was by the first Respondent. Both revision applications were decided by common Judgment and Order dated 26th July 2005. The learned Sessions Judge by the said Judgment and Order dismissed the revision application preferred by the Petitioner and allowed the revision application preferred by the first Respondent. The learned Sessions Judge directed the Petitioner to pay maintenance at the rate of Rs.1500/- per month to the first Respondent from the date of application.

4) The parties appointed Shri S.V. Begampure, Advocate as a Mediator. The Mediator in his report dated 25th November 2005 has stated that inspite of best efforts, a settlement could not be brought out between the parties. In view of the said report, writ petitions were heard on merits.

5) Shri. Warunjikar appearing for the Petitioner-husband submitted that considering the conduct of the first Respondent of publishing public notice of customary divorce on 22nd March 2000, the Courts below could not have granted maintenance to the first Respondent. He placed reliance on the consent terms filed in Hindu Marriage Petition no. 223 of 2001 and submitted that there has been a complete settlement

between the parties and in view of Clause No. 2 of the consent terms, right of the first Respondent to claim maintenance did not survive. He submitted that a sum of Rs.10,000/- in cash was paid by the Petitioner to the first Respondent at the time of settlement. He submitted that considering the present income of the Petitioner, it is impossible for him to pay maintenance at the rate of Rs.1500/- especially when he has re-married and the second wife is depending on him for support.

6) Shri. Bodke appearing for the first Respondent submitted that though the consent terms record that the first Respondent had received maintenance upto 10th September 2002 from the Petitioner, in fact the Petitioner has not led any evidence to show that any specific amount was paid by the Petitioner to the first Respondent. He submitted that the agreement recorded in the consent terms regarding waiver of right of the first Respondent to claim maintenance is void being contrary to the public policy. He submitted that the Courts below were justified in awarding maintenance from the date of application.

7) I have considered the submissions. Perusal of the consent terms dated 22nd September 2002 filed in the matrimonial petition and in particular clause no. 2 thereof show that the first Respondent received maintenance upto 10th September 2002 from the

Petitioner. Clause no.2 further records that the first Respondent will not claim maintenance upto the period ending with 10th September 2002 in any proceeding including the pending application under Section 125 of the said Code. Clause No. 2 does not record waiver of right to claim maintenance in future. It records a factual statement that the first Respondent has received maintenance upto 10th September 2002 and therefore, the first Respondent will not claim the said amount in any proceedings.

8) In the examination-in-chief, the first Respondent has not stated that the statement in consent terms regarding receipt of maintenance upto 10th September 2002 was incorrect or that she has in fact not received maintenance amount as mentioned in the consent terms. The first Respondent has merely stated that she has not given up her right to claim maintenance. She stated that her Advocate signed the consent terms and she has also put her signature on the consent terms. She admitted that consent terms were filed in two proceedings. At any stage the first Respondent has not stated anything about the non receipt of maintenance amount upto 10th September 2002. If such a specific case was made out by the first Respondent regarding non receipt of amount for the period upto 10th September 2002, the burden would have shifted on the Petitioner to prove that the maintenance amount has been paid. But that is not the case made

out by the first Respondent. Thus the Courts below could not have made the maintenance payable from the date of filing of application and the maintenance ought to have been ordered to be paid from October 2002.

9) The submission of the Petitioner that a sum of Rs.10,000/- was paid in cash cannot be accepted for the simple reason that the said case is not made out at any stage and even in these two petitions.

10) It is not in dispute that the marriage has been dissolved. In view of the consent terms, it cannot be inferred that first Respondent has deliberately refused to cohabit with the Petitioner. The clause two of the consent terms does not record waiver of right to receive maintenance for the period subsequent to 10th September 2002. It is very difficult to find fault with the finding recorded by the Courts below as regards entitlement of the first Respondent to receive maintenance from the Petitioner.

11) The Revisional Court has observed that the Trial Court proceeded on assumption that the salary payable to the Petitioner was Rs.4,375/- per month. The Revisional Court observed that it was the case of the Petitioner himself that he was earning Rs.6,000/- per month. The Revisional Court also noted the fact that the Petitioner has re-married subsequently. Considering the fact that income of the Petitioner is

Rs.6,000/- per month, maintenance amount has been fixed at Rs.1,500/- by the Revisional Court. The amount is just and reasonable. It is not possible to interfere with quantum of maintenance amount in these Petitions under Article 227 of the Constitution of India.

12) The petitions will have to be allowed only to the extent to which maintenance is made payable from the date of application and the Petitioner will have to be directed to pay maintenance from 1st October 2000.

13) Hence, I pass following order.

O R D E R

i) The impugned Judgment and Order dated 26th July 2005 is modified.

ii) Clause No. 3 of the Operative Part of the said Judgment and Order will now read thus :

> "The order passed by the Trial Court on 27th April 2004 is modified to the extent that the husband shall pay maintenance at the rate of Rs.1,500/- per month to the wife from 1st October 2002. The order of payment of costs is

confirmed".

iii) If the Petitioner is in arrears, time of two months granted to the Petitioner to pay the arrears. If the amount, if any, deposited by the Petitioner till today is sufficient to meet the arrears, the Petitioner will be entitled to necessary adjustment.

iv) The Petitioner is directed to pay a sum of Rs.5,000/- to the first Respondent being costs of these two petitions. The amount to be paid within a period of six weeks.

v) Rule is partly made absolute in above terms.

(ABHAY S. OKA, J.)